90-351

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1990

STEVEN P. GERBER,
Cross-Petitioner,

v.

V-1 OIL COMPANY,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOSEPH B. MEYER
Attorney General
State of Wyoming

MARY B. GUTHRIE
Senior Assistant
Attorney General
Counsel of Record

STEVE JONES
Senior Assistant
Attorney General
State of Wyoming

123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

Attorneys for
Cross-Petitioner
Steven P. Gerber

QUESTIONS PRESENTED FOR REVIEW

1. Is WYO. STAT. §35-11-109(a)(vi) (Cum. Supp. 1990), which permits warrantless administrative searches by environmental inspectors, constitutional under the fourth amendment?

2. Was V-1 Oil Company's expectation of privacy adequate to support an action pursuant to 42 U.S.C. §1983?

3. Is Steven P. Gerber entitled to good faith qualified immunity from suit under 42 U.S C. §1983, on the ground that he did not violate a clearly established right of V-1 Oil Company?

LIST OF PARTIES

Steven P. Gerber brings this matter before the United States Supreme Court on a cross-petition for writ of certiorari.

V-1 Oil Company, a Wyoming corporation, is named in this matter as the Cross-respondent.

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Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Cross-petitioner, Steven P. Gerber, requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on April 30, 1990.

OPINIONS BELOW

On September 28, 1988, the U.S. District Court for the District of Wyoming issued its decision in this matter, which has been recorded at 696 F.Supp. 578 (D. Wyo. 1988). V-1 Oil Company appealed the decision of the District Court to the Tenth Circuit Court of Appeals. The opinion of the Court of Appeals is reported at 902 F.2d 1482 (10th Cir. 1990). A copy of the Tenth Circuit's opinion has been attached to V-1 Oil Company's Petition for Writ of Certiorari as Appendix A.

A copy of the opinion of the U.S. District Court is attached to V-1 Oil Company's Petition for Writ of Certiorari as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 30, 1990. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). This suit was brought initially pursuant to 42 U.S.C. §1983.

The Cross-respondent, V-1 Oil Company, filed a petition for writ of certiorari in this matter on July 23, 1990. The Cross-petitioner received that petition on July 23, 1990. The Cross-petition is submitted pursuant to Rule 12.3 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved:

United States Constitution
Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution
Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

WYO. STAT. §35-11-109 (Cum. Supp. 1990)

Powers and duties of director.

(a) In addition to any other powers and duties imposed by law, the director of the department shall:

(vi) Designate authorized officers, employees or representatives of the department to enter and inspect any property, premise or place, except private residences, on or at which an air, water or land pollution source is located or is being constructed or installed, or any premises in which any records required to be maintained by a surface coal mining permittee are located. Persons so designated may inspect and copy any records during normal business office hours, and inspect any monitoring equipment or method of operation required to be maintained pursuant to this act at any reasonable time (upon reasonable notice) upon presentation of appropriate credentials, and without delay, for the purpose of investigating actual or potential sources

> of air, water or land pollution and for determining compliance or noncompliance with this act, and any rules, regulations, standards, permits or orders promulgated hereunder. For surface coal mining operations, right of entry to or inspection of any operation, premises, records or equipment shall not require advance notice. The owner, occupant or operator shall receive a duplicate copy of all reports made as a result of such inspections within thirty (30) days. The Department shall reimburse any operator for the reasonable costs incurred in producing copies of the records requested by the department under this section.

STATEMENT OF THE CASE

Steven P. Gerber is the Northwest District Supervisor for the Wyoming Department of Environmental Quality, Water Quality Division. Part of Mr. Gerber's duties include investigating discharges of pollution, including petroleum products, into surface water or groundwater within the State.

The actions taken by Cross-petitioner Gerber in this matter occurred on April 28, 1988, in Lander, Wyoming at a retail gasoline station owned by Cross-respondent V-1 Oil Company (hereinafter "the V-1 station").

The V-1 station is a self service gasoline station that sells gasoline to retail customers and is open to the public during normal business hours from 7:00 a.m. until 9:00 p.m. daily. In addition to selling gasoline, the V-1 station also sells liquid propane and certain grocery products and operates a video movie rental business.

When Steve Drake, an employee of V-1 Oil, came on duty at the station at 3:00 p.m. on April 28, 1988. Rick Evans, the station manager, told him to notify him if anyone wanted to "look at dirt or whatever" and that "DEQ might come by and look at it."

At approximately 8:20 p.m., Cross-petitioner Gerber, acting upon the advice of an assistant attorney general for the State of Wyoming, walked onto the V-1 station premises and notified the attendant that he was there to conduct an inspection of the premises pursuant to state statute. Mr. Gerber had been aware that the V-1 station was a source of gasoline pollution because samples of groundwater taken from wells located hydrologically downgradient from the V-1 station had revealed that the groundwater was polluted by gasoline.

Mr. Gerber inspected the area where underground storage tanks containing gasoline were located. He observed that the underground storage tanks, although they had been uncovered, were being prepared for testing, and not removal. Mr. Gerber also noticed very strong hydrocarbon odors in the excavation area. He collected a sample of soil near one of the underground storage tanks. Shortly thereafter, Mr. Gerber left the area. The entire incident lasted approximately ten minutes.

REASONS THE CROSS-PETITION SHOULD BE GRANTED

Summary

This matter should be heard by the Court for three reasons. It presents an important question of the constitutionality of warrantless administrative search statutes relating to environmental violations. It presents an excellent opportunity for the Court to define the limits of a reasonable expectation of privacy, in the context of a retail business setting, for actions brought pursuant to 42 U.S.C. §1983. Finally, a conflict in circuit court opinions exists on the issue of good faith qualified immunity from suit in civil rights action.

I.

THE CONSTITUTIONALITY OF WARRANTLESS ENVIRONMENTAL INSPECTION STATUTES IS AN ISSUE OF NATIONAL IMPORTANCE.

Introduction

In the last twenty-five years, Congress has passed an array of environmental statutes which give inspectors "a right of entry" to various facilities.[1]

All of these inspection statutes authorize the federal government to enter and inspect designated property without obtaining a search warrant. These statutes are not limited to particular types of businesses.

The State of Wyoming's environmental inspection statute covers all businesses at which a pollution source may be

1. See Clean Water Act of 1977 §308, 33 U.S.C. §1318(a)(B) (1986). (Giving the administrator a right of entry to, upon or through a facility in which an effluent source is located or in which any records required to be maintained under the Act or located in and to have access or copy such records, inspect monitoring, equipment and sample effluents); Comprehensive Environment Response. Compensation and Liability Act of 1980 (CERCLA) §104(e), 42 U.S.C. §9604(e) (West Supp. 1985) (giving any officer, employee, or representative of the President, duly designated by the President, the right to enter at reasonable times, any vessel, facility, establishment or other place or property where any hazardous substance may be or has been generated, stored, treated, disposed of or transported from, from which or to which a hazardous substance has been or may have bene released, where such a release is or may be threatened or where entry is needed to determine the need for or the appropriate response or to effectuate a response action) (amended by SARA 1986); Resource Conservation and Recovery Act of 1976 (RCRA) §3007, 42 U.S.C. §6927(a)(1982) (giving the Administrator a right of entry to, upon or through in which an effluent sources is located and to have access to or copy such records, inspect monitoring equipment and sample emissions); Hazardous Liquid Pipeline Safety Act of 1979 §211(c), 49 U.S.C. §2010(c) (West Supp. 1988); Hazardous Materials Transportation Act of 1974 §109(c), 49 U.S.C. §1808(c) (1982); Federal Insecticide. Fungicide and Rodenticide Act (FIFRA) §9, 7 U.S.C. §136g(a)(1980); Toxic Substances Control Act (TSCA) §11, 15 U.S.C. §2610 (1982).

located. Except for this somewhat broader "pollution source" language, Wyoming's inspection statute is very similar to the federal inspection statutes contained in several federal environmental protection acts.

Both federal and state governments have recognized the need to conduct environmental inspections without search warrants. If the Tenth Circuit opinion is allowed to stand, the constitutionality of those statutes would be challenged. This, under at least some circumstances, would be a disaster for environmental enforcement in the United States.

A Balancing Test Reveals that Searches of this Type are Reasonable.

The expectation of privacy of a commercial business owner must be balanced against the considerable public need to use warrantless inspection statutes of general applicability.

In *Michigan Department of State Police v. Sitz*, __ U.S. __, 110 S.Ct. 2481, 110 LEd2d 412 (1990), the Court utilized a balancing testing in which a substantial state interest was weighed against a defendant's expecation of privacy. The Court also observed that in order for a search to be valid it must be "reasonable" under the fourth amendment. 110 S.Ct. at 2485.

Based on its holding in *Sitz*, the Court should now examine Wyoming's administrative inspection statute to determine whether environmental inspections are reasonable. There is a substantial governmental interest in protecting the environment and the public from harmful pollution. This interest, if balanced against the slight intrusion on the privacy expectations of V-1 Oil Company, must weigh more heavily. Under such a balancing test, the search conducted by Cross-petitioner Gerber is reasonable and within the bounds of the fourth amendment.

Probable cause to conduct the search was established by the State's evidence that gasoline was present in the groundwater immediately downgradient from the V-1 Oil station. The warrantless search was also reasonable because of the

need to collect information without delay. The State had made an effort to obtain a court order. But only after it was obvious that a court order could not be obtained while the tanks were still exposed did the state abandon its efforts to get a warrant. The need for this warrantless administrative inspection was great and the governmental interest was substantial. Further, the statute under which Mr. Gerber operated limited the inspection as to time, place and scope.

Balanced against this need for a warrantless inspection, is V-1 Oil Company's arguable expectation of privacy. However, any expectation of privacy that V-1 Oil Company had was, at best, insignificant. The V-1 station sold gasoline to the public and the public was free to enter on its property for that purpose, as well as to buy grocery items, or rent movies. The underground storage tanks which were inspected by Cross-petitioner Gerber were in open view. There was no enclosure around the area.

Under the balancing test of *Michigan Department of State Police v. Sitz, supra,* Mr. Gerber's search was reasonable.

The Wyoming Warrantless Environmental Inspection Statute Meets the Requirements of New York v. Burger.

In *New York v. Burger,* 482 U.S. 691 (1987), this Court held that a New York statute which authorized the warrantless inspection of automobile junkyards satisfied the fourth amendment. The Court specifically held that in order for a warrantless inspection statute to be valid the statute must support a substantial governmental interest; the statute must be necessary to further a regulatory scheme; and the statute must be limited in time, place and scope so that the inspector has little discretion.

It is undisputed that Cross-petitioner Gerber complied with the Wyoming statute when he made his warrantless inspection. The inspection occurred while the gasoline station was open during regular business hours. Mr. Gerber presented his credentials and "inspected without delay." Mr. Gerber's

inspection was limited to investigating "sources of pollution." All that Mr. Gerber did was observe the station's underground storage tanks and take a small sample of soil near the tanks.

The environmental inspection of a closely regulated industry, such as the retail distribution of gasoline, under a statute which authorizes the investigation of any "actual or potential sources of pollution" should be upheld by this Court. There was a substantial governmental interest in the protection of the environment and the public from pollution. The warrantless inspection was necessary to further the State's regulatory environmental scheme. The Wyoming statute embodies the two basic aspects of a warrant: it requires that the owner of the commercial premises be advised that the search was being made pursuant to law and it limits the scope of the search to environmental concerns. The statute further limits the discretion of the inspecting officer by requiring that the inspection be made "during normal office hours" or at a "reasonable time." *New York v. Burger,* 482 U.S. at 711. Furthermore, the scope of the statute is properly defined. An inspection is only permitted so that actual or potential sources of pollution may be identified.

The effect of the Tenth Circuit's opinion will be to require both Congress and state legislatures to develop statutes which recite a laundry list of inspection authority for various closely regulated businesses. This is unnecessary when the essential requirements of *New York v. Burger, supra,* have been met and when the need for warrantless environmental inspections is clearly in the public interest.

II.

THE EXTENT OF A RETAIL BUSINESS' EXPECTATION OF PRIVACY IS AN IMPORTANT NATIONAL ISSUE ON WHICH GUIDANCE FROM THE COURT IS NEEDED.

The fourth amendment to the United States Constitution protects "people" and secures them against unreasonable

searches of their "persons, houses, papers and effects." Whether an unreasonable search has occurred will depend in part upon whether the person had an expectation of privacy in the thing or area to be searched.

While an expectation of privacy has been held to extend to commercial premises, that expectation is less than an individual has in his own home. *Donovan v. Dewey,* 452 U.S. 594, 598-99 (1981). This expectation of privacy for businesses in "closely regulated" industries is particularly attenuated. *New York v. Burger,* 482 U.S. at 700.

In *Katz v. United States,* 389 U.S. 347, 361 (1967), in a concurrence, Justice Harlan set out a two-prong test for determining whether an expectation of privacy had been violated. First, there must be an actual or subjective expectation of privacy in the area inspected. Second, that expectation must be one that society would deem reasonable. 389 U.S. at 361. See also, *Smith v. Maryland,* 442 U.S. 735, 740 (1979) and *Rakas v. Illinois,* 439 U.S. 128, 139-40 (1978)

At some point, under the *Katz* doctrine, the outer limits of a corporation's expectations of privacy is reached. This case presents an excellent opportunity for this Court to define precisely the nature of those outer limits.

As this Court concluded in *Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 U.S. 861 (1974), privately owned lands constitute "open fields" so long as the public is able to enter them. 416 U.S. at 865. The principle that no expectation of privacy exists in an open field was first articulated in *Hester v. United States,* 265 U.S. 57 (1924). In *Dow Chemical Company v. United States,* 476 U.S. 227 (1986), the Court declined to find any "industrial curtilage" in which a corporation could claim that it had a legitimate expectation of privacy. Without a reasonable expectation of privacy, there can be no violation of fourth amendment rights, and therefore, no need to obtain a search warrant.

As was made clear in *Air Pollution Variance Board v. Western Alfalfa Corp., supra,* entry onto private land on which

the public is able to enter does not constitute an unreasonable search. Similarly, Cross-petitioner Gerber's entry onto the retail gasoline station owned by V-1 Oil Company should not be considered to have constituted an unreasonable search, because he did not intrude upon any legitimate expectation of privacy.

It is true that Mr. Gerber also took a sample of soil from near the underground storage tanks. Because Mr. Gerber noted strong hydrocarbon odor in the area of the underground storage tanks, his removal of a soil sample as evidence was justified under the plain view doctrine. *Payton v. New York,* 445 U.S. 573, 586-87 (1980) and *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 354 (1977). He was legitimately present on the V-1 station property, as any member of the public would be, and only after smelling the strong odor emanating from the tank area (the equivalent of a "plain view") did the need to preserve the soil sample as evidence arise. Probable cause was present and the evidence was seized from an essentially open field. See *Oliver v. United States,* 466 U.S. 170 (1984).

The use, or misuse, of 42 U.S.C. §1983, by corporations as a vehicle for filing lawsuits against governmental officials will be greatly expanded if the Tenth Circuit Court of Appeals decision is allowed to stand. However, a ruling from this Court on the limits of a corporation's reasonable expectations of privacy in retail business establishments would decrease the number of such lawsuits to situations where a corporation's privacy has actually been invaded.

III.

THERE IS A CONFLICT BETWEEN CIRCUIT COURTS OF APPEAL ON THE SUBJECT OF GOOD FAITH QUALIFIED IMMUNITY.

In *Freeman v. Blair,* 793 F.2d 166 (8th Cir. 1986), the Circuit Court of Appeals for the Eighth Circuit held that South Dakota officials who had inspected a campground pursuant

to a warrantless administrative search statute were not entitled to a good faith qualified immunity from suit for actions brought under 42 U.S.C. §1983. The *ratio decidendi* was that the statute did not provide sufficiently detailed guidelines to insure that the warrantless inspection of campgrounds would be conducted with the requisite "certainty and regularity." 793 F.2d at 175. S.DAK. STAT. §34-18-24 directed the Secretary of Health to "periodically inspect . . . every . . . campground operating within this state for compliance with the provisions of this chapter and the rules and regulations of the Department of Health." Any search was to be done at any "reasonable time." See *Freeman v. Blair,* 793 F.2d at 175.

The case was appealed and the United States Supreme Court, in *Blair v. Freeman,* 483 U.S. 1014 (1987), reversed and remanded with instructions to the Eighth Circuit to decide the case in light of this Court's decisions in *Anderson v. Creighton,* 483 U.S. 635 (1987) and *New York v. Burger, supra.*

On remand, the Eighth Circuit Court concluded that at the very least, the regulatory scheme established by the South Dakota statute was "not sufficiently obvious to make the defendant's reliance on the scheme objectively unreasonable." *Freeman v. Blair,* 862 F.2d 1330, 1331 (8th Cir., 1988). The defendants in that case were, therefore, entitled to a good faith qualified immunity from suit.

At the time of the inspection conducted by Cross-petitioner Gerber, *Blair v. Freeman* was on remand. At that point in time, a reasonable interpretation of the status of warrantless inspection statutes would have been that any statute which was at least minimally circumscribed would generally be viewed as constitutional. Yet, the Tenth Circuit Court of Appeals in *V-1 Oil v. State of Wyoming, et al.,* 902 F.2d 1482 (10th Cir. 1990) ruled that the law in this area is clearly established and that Cross-petitioner Gerber would not have been entitled to a good faith qualified immunity from suit, but for extraordinary circumstances.

There is a clear contradiction between the Eight and Tenth Circuit Courts of Appeal on this issue. The Supreme Court should settle this conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General

MARY B. GUTHRIE*
Senior Assistant
Attorney General

STEVE JONES
Senior Assistant
Attorney General

123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

Attorneys for Cross-Petitioner
Steven P. Gerber

August, 1990

* Counsel of Record

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

Law Offices of Andrews & Anderson, P.C.
**F. M. ANDREWS, JR., ESQ.
ROBERT O. ANDERSON, ESQ.
Broadway and Park
Riverton, Wyoming 82501
(307) 856-9279
Attorneys for Cross-Respondent
V-1 Oil Company

***Attorney of Record for Cross-Respondent*

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QUESTIONS PRESENTED

1. Is Wyo. Stat. § 35-11-109(a) (vi) which permits warrantless administrative searches by environmental inspectors, constitutional under the Fourth Amendment?

2. Was V-1 Oil Company's expectation of privacy adequate to support an action pursuant to 42 U.S.C. § 1983?

3. Is Steven P. Gerber entitled to good faith qualified immunity from suit under 42 U.S.C. § 1983, on the ground that he did not violate a clearly established right of V-1 Oil Company?

LIST OF PARTIES

Steven P. Gerber brings this matter before the United States Supreme Court on a Cross-Petition for Writ of Certiorari.

V-1 Oil Company, a Wyoming corporation, is named in this matter as the Cross-Respondent.**

** Subsidiaries of the Cross-Respondent are:

V-1 Oil Company, a Utah corporation
V-1 Oil Company, a Wyoming corporation
V-1 Gas Company, a Wyoming corporation
V-1 Gas Company, an Idaho corporation
V-1 Petroleum Company
V-1 Propane Company
V-1 Self-Serve Company, Inc.
Weathertite Block Company

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No._____

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OCTOBER TERM 1990

STEVEN P. GERBER,
Cross-Petitioner,

vs.

V-1 OIL COMPANY,
Cross-Respondent.

BRIEF IN OPPOSITION TO STEVEN P. GERBER'S CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Cross-Respondent, V-1 Oil Company, respectfully requests that the Cross-Petition for Writ of Certiorari of Cross-Petitioner Steven P. Gerber be denied.

OPINIONS BELOW

On September 28, 1988, the U.S. District Court for the District of Wyoming issued its decision in this matter,

which has been recorded at 696 F.Supp. 578 (D. Wyo. 1988). V-1 Oil Company appealed the decision of the District Court to the Tenth Circuit Court of Appeals. The opinion of the Court of Appeals is reported at 902 F^2 1482 (10th Cir. 1990). A copy of the Tenth Circuit's opinion is attached to V-1 Oil Company's Petition for Writ of Certiorari, as Appendix A. A copy of the opinion of the U.S. District Court is attached to V-1 Oil Company's Petition for Writ of Certiorari, as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 30, 1990. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This suit was brought initially pursuant to 42 U.S.C. § 1983.

The Cross-Respondent, V-1 Oil Company, filed a Petition for Writ of Certiorari in this matter on July 23, 1990. The Cross-Petitioner received that petition on July 23, 1990. The Cross-Petition was submitted pursuant to Rule 12.3 of the Rules of the Supreme Court of the United States, and was received by the Cross-Respondent on August 23, 1990.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved:

Constitution of the United States
Amendment IV

Security from Unwarrantable Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States
Amendment V

Rights of Accused in Criminal Proceedings

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States
Amendment XIV, Section 1

Citizenship Rights Not To Be Abridged by States

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 35-11-109, W.S. 1977, Amended 1988

Powers and duties of director.

(a) In addition to any other powers and duties imposed by law, the director of the department shall:

(vi) Designate authorized officers, employees or representatives of the department to enter and inspect any property, premise or place, except private residences, on or at which an air, water or land pollution source is located or is being constructed or installed, or any premises

in which any records required to be maintained by a surface coal mining permittee are located. Persons so designated may inspect and copy any records during normal office hours, and inspect any monitoring equipment or method of operation required to be maintained pursuant to this act at any reasonable time (upon reasonable notice) upon presentation of appropriate credentials, and without delay, for the purpose of investigating actual or potential sources of air, water or land pollution and for determining compliance or noncompliance with this act, and any rules, regulations, standards, permits or orders promulgated hereunder. For surface coal mining operations, right of entry to or inspection of any operation, premises, records or equipment shall not require advance notice. The owner, occupant or operator shall receive a duplicate copy of all reports made as a result of such inspections within thirty (30) days. The department shall reimburse any operator for the reasonable costs incurred in producing copies of the records requested by the department under this section;

STATEMENT OF THE CASE

MATERIAL FACTS

Petitioner V-1 Oil Company owns and operates a self-service gasoline station in Lander, Wyoming. It sells retail gasoline and liquified petroleum gas to retail customers.

On April 28, 1988, the dirt and concrete had been removed from the top of the gasoline storage tanks pre-

paratory for a pressure test for leaks. Respondent Steven Gerber is an engineer with the Department of Environmental Quality, Water Quality Division (DEQ). On April 28, 1988, Mr. Gerber drove by the station and saw concrete being broken out. He thought some storage tanks were being removed and wanted to inspect the work. He could not see the tanks without being on the property. (Gerber Deposition, pp. 16, 17, 27). On that morning while excavation was first in progress, Mr. Gerber came to the excavation site and was asked to leave by the station manager for V-1. The area had been roped off from the general public with barrels, piping and flags. (Evans' Deposition, pp. 15, 24-25; Wood Affidavit, Document No. 15). Mr. Gerber returned about 1:30 p.m. and again was asked to leave the premises by Mr. Leonard Wood, V-1's area manager. Rick Evans, the station manager, on the same day, told the day worker, Steve Drake, who came on duty at approximately 3:00 p.m., that if any DEQ people came to inspect, they were to be told to stay in the station until he, Rick Evans, could get there. During the day, Gerber had contacted Steve Jones, Assistant Attorney General for Wyoming, who advised him that § 35-11-109(a) (vi) permitted warrantless searches. (Gerber Affidavit, Jones' Affidavit, in support of Motion for Summary Judgment).

Mr. Gerber again returned to the station at 8:20 p.m., when all management people were gone, for the purpose of gathering evidence of a possible DEQ violation. (Gerber Deposition, pp. 16-21). He was accompanied by two people, one of whom was a policeman. He showed the attendant a business card and identified himself. He was told by the station employee he was to stay in the station until Rick Evans, the manager, arrived. Nevertheless, Gerber, claiming he had the authority to inspect "under state law" (Drake Deposition, pp. 7, 11, 13, 22), then proceeded to the excavation site, took a sample of dirt, which he handed to the policeman who had accompanied him, who then left

with the sample. When a demand for the return of the sample was made by Mr. Evans, Mr. Gerber stated he did not have the sample. He later retrieved the sample from the policeman. (Gerber Affidavit, Ex. 5).

On Motion for Summary Judgment, the Honorable Alan R. Johnson, Judge, granted the State's Motion for Summary Judgment, finding that § 35-11-109(a) (vi) allowed warrantless searches; that the search was reasonable; that there was no clearly established law prohibiting Gerber's actions.

On appeal, the Tenth Circuit Court of Appeals, reversing in part, found that the subject statute authorized warrantless searches, but that the statute did not provide a constitutionally adequate substitute for a warrant; that the law was clearly established and that Gerber's warrantless search violated petitioner's Fourth Amendment rights.

Mr. Gerber has filed a Cross-Petition for Writ of Certiorari seeking a reversal of the Tenth Circuit Court's decision and holding that the statute did not provide a constitutionally adequate substitute for a warrant.

REASONS FOR DENYING THE WRIT

The Wyoming statute is limited in scope and narrow in application to inquiries of the Wyoming Environmental Council. There was a reasonable expectation of privacy protected by the Fourth Amendment; qualified immunity is based upon an objective test, rather than the subjective test of good faith.

I. THAT THE WYOMING ENVIRONMENTAL QUALITY INSPECTION STATUTE IS UNCONSTITUTIONAL HAS NO NATIONAL IMPACT.

Cross-Petitioner Gerber seeks a reversal of the Tenth Circuit Court's ruling that the subject statute is unconstitutional, not on the ground that it complies with constitutional requirements, but because several federal statutes granting the power of warrantless searches may be called into question and it would be to the advantage of government to circumvent the constitutional protection of the warrant requirements of the Fourth Amendment.

Neither of these arguments are of national importance or establish the necessary constitutional protection required of warrantless searches. The constitutionality of warrantless searches must be made on a case by case basis. *See v. City of Seattle,* 387 U.S. 541, 546, 87 S.Ct. 1737, 1741, 18 L.Ed.^{2} 943 (1967).

The government's need (or desire) to make discretionary inspections, randomly and without constraint, should not be permitted to overwhelm the citizen's right to a prior judicial inquiry and approval before an administrative inspection occurs. Whether or not the Tenth Circuit decision would form a basis for challenging other warrantless search statutes is purely speculative. *Marshall v. Barlow's, Inc.,* 436 U.S. 305, 322, 98 S.Ct. 1816, 1825.

Discretionary federal administrative search statutes have been stricken as unconstitutional. *Marshall v. Barlow's, Inc., id,* 436 U.S. 307; *Marshall v. Horn Seed Company, Inc.,* 647 F^2 96 (10th Cir. 1981); (Occupational Safety and Health Act of 1970, § 8 (f) (1), 29 U.S.C.A. § 657 (f) (1), cf. *Robberson Steel Co. v. Occupational Safety and*

Health Review Commission, 645 F^{2} 22 (10th Cir. 1980).

Wyoming Inspection Statute Does Not Meet the Requirements of *New York v. Burger*

As in *Donovan v. Dewey*, 452 U.S. 593, 101 S.Ct. 2534, the statute at bar

> "is without standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search . . . instead, simply provide that such searches must be performed 'at . . .reasonable times, and within reasonable limits and in a reasonable manner . . .' ", and "devolves almost unbridled discretion upon executive and administrative offices, particularly those in the field, as to whom to search and when to search." *Donovan v. Dewey*, 452 U.S. at 601, 101 S.Ct. at 2636.

It is of singular importance that the Wyoming investigative statute only permits designated persons to

> ". . . inspect any monitoring equipment or method of operation required to be maintained pursuant to this Act at any reasonable time (upon reasonable notice) . . .' § 35-11-109(a) (vi).

There is no showing that V-1 had any monitoring equipment nor any method of operation required to be maintained by the Act. Indeed, this is not what Gerber was inspecting. The statute has no application for random inspections of potentially leaking underground storage tanks.

In any event, the Wyoming inspection statute does not provide a constitutionally adequate substitute for a warrant, in that it applies to every business in Wyoming; does not advise an owner that his property will be subject to periodic inspection; does not provide assurance of regularity; does not limit the discretion of the inspectors, in that it does not clearly define what is to be searched, who can be searched, and the frequency of such searches. *New York v. Burger,* 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.^{2} 601 (1987); *Marshall v. Barlow's, Inc., supra,* 436 U.S. at 323; *Donovan v. Dewey, supra,* 452 U.S. at 599.

II. V-1'S EXPECTATION OF PRIVACY WAS ESTABLISHED AND GUARANTEED BY THE FOURTH AMENDMENT AND THE WARRANTLESS SEARCH WAS NOT REASONABLE.

Mr. Gerber could not see the excavation site without being on the property. The area was roped off from the general public and marked with barrels, piping and flags. Three times on that day he was refused access. Since the excavation site was protected from public intrusion, and as Mr. Gerber could not see the site or extract a soil sample without entering the enclosed area, neither the plain view nor open field doctrine applies. *Marshall v. Barlow's, Inc., supra,* at 315, 98 S.Ct. at 1822; *United States v. Rucinski,* 658 F^2 741, 745 (10th Cir. 1981); *Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corporation,* 416 U.S. 861, 40 L.Ed.^{2} 607, 94 S.Ct. 2114. Excepting the public from an excavation area is both reasonable and necessary. Even though accessible to the public, it is constitutionally protected. *Katz v. United States,* 389 U.S. 347, 361.

Michigan Department of State Police v. Sitz, _____ U.S. _____, 110 S.Ct. 2481, 110 L.Ed.[2] 412 (1990) is cited by the State as authority for the requirement of a balancing test of the expectation of privacy against the public need for warrantless inspections. *Sitz* involved a sobriety checkpoint program for evidence of intoxicated drivers. The investigation was applied uniformly to all drivers encountering the roadblock, and averaged a 25-second delay per person.

This is a substantially different application for denying the right of privacy than a non-consensual inspection of the land of a single proprietor for the sole purpose of attempting to determine whether or not an environmental violation had occurred, and is no authority for carte blanche inspections, randomly selected, for unknown but suspected environmental violations. Random, infrequent or unpredictable warrantless inspections where the owner has no real expectation that his property will be from time to time inspected by government officials are constitutionally objectionable. *Donovan v. Dewey, supra,* 452 U.S. at 598, 101 S.Ct. at 2538.

That the State of Wyoming did not intend to grant warrantless inspection authority was demonstrated by the lack of authority to the Wyoming Environmental Quality Council to issue administrative warrants.

In any event, administrative inspection warrants are available on a lesser showing of cause than criminal warrants, and impose no serious burden on the inspection system or the courts. *Marshall v. Barlow's Inc., supra,* 436 U.S. 305, 315, 98 S.Ct. 1816, 1822; *Marshall v. Horn Seed Co., Inc., supra,* 647 F.2 96 (10th Cir. 1981).

The State argues that it tried to get a warrant on the inspection date. It is more than apparent that the excava-

tion was open at 8:20 p.m.. when the inspection did occur, and would still be open the following day. The plain truth is that the State simply bulled its way past V-1's employee, and now seeks justification for the conduct of its officials.

III. THERE IS NO CONFLICT BETWEEN CIRCUIT COURT DECISIONS ON THE QUESTION OF QUALIFIED IMMUNITY.

Blair v. Freeman, 483 U.S. 1014 (8th Cir. 1987) reversed and remanded *Freeman v. Blair,* 793 F^2 166 (8th Cir. 1986) in light of the Court's earlier decision in *Anderson v. Creighton,* 483 U.S. 635, 97 L.Ed.^{2} 523, 107 S.Ct. 3034. *Anderson* required that the actions of the inspector be evaluated under the standard of "objective legal reasonableness" and the legal rules that were "clearly established" at that time. *Freeman v. Blair,* 862 F^2 1330, 1331 (8th Cir. 1988).

The subject South Dakota statute was specifically directed at the campground industry and required periodic inspections for compliance with . . . rules and regulations of the department. *Freeman v. Blair, ibid,* 793 F^2 166, 175 (8th Cir. 1986).

The South Dakota statute provided at least a minimal requirement of periodic inspection of a pervasively regulated industry. *New York v. Burger, supra,* 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.^{2} 601 (1987).

The Eighth Circuit found that the commercial campground business was pervasively regulated, but that any defects in the regulatory scheme set forth in the statute were not sufficiently obvious to make the defendant's reliance on the scheme objectively unreasonable. *Freeman v. Blair, ibid,* 862 F^2 at 1331.

This is not the factual situation in the case at bar. The Wyoming statute does not target the retail gasoline industry, which is not pervasively regulated under the Wyoming Environmental Quality statutes; the statute does not provide for periodic inspections. There is no basis for an objectively reasonable inspector to not know that the statute was unconstitutional in view of V-1's clearly established right to be free of warrantless searches.

Accordingly, there is no conflict between the Circuit court decisions on this question.

CONCLUSION

For the foregoing reasons, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

F. M. Andrews, Jr.**

Robert O. Anderson

Andrews and Anderson, P.C.
Broadway and Park
Riverton, Wyoming 82501
(307) 856-9279

Attorneys for Cross-Respondent V-1 Oil Company

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***Counsel of Record*